82-525

Office - Supreme Court, U.S.
FILED
SEP 21 1982
ALEXANDER L. STEVAS,
CLERK

THE SUPREME COURT OF THE UNITED STATES

M. W. ZACK METAL CO.,

Petitioner,

-against-

INTERNATIONAL NAVIGATION CORPORATION OF MONROVIA, JANSEN & COMPANY, CONTAM LINIE, HANS H. JANSEN, JURGEN N. KRAFFT, NEWCASTLE PROTECTION & INDEMNITY ASSOCIATION, THE LONDON STEAMSHIP MUTUAL INSURANCE ASSOCIATION LIMITED,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

ANTHONY B. CATALDO
Attorney for Petitioner
Office & P.O. Address:
53 Park Place
New York, N.Y. 10007
(212) 962-0965

QUESTIONS PRESENTED

1. With respect to the District Court's decision of dismissal of four causes of action on motions under Rule 12(b), wasn't it and the majority opinion in conflict with the general rule stated in the statute and the applicable decisions of this court and of all the Courts of Appeal in the land, because the facts alleged would, if proven, entitle plaintiff to the relief sought, and that all well pleaded allegations would be deemed addmitted, and, reversible error was made below.

2. In respect of the first three of the four causes dismissed, the second and third would stand or fall as the first would stand or fall. The first was dismissed by the alleged operation of COGSA's time limitation. Plaintiff claims that that was error because this suit was not subject to COGSA's time-bar because that right of the ocean carriers was defeated by the prior timely commenced suits on this claim. May COGSA be so interpreted? This is a novel question, never having before been decided. Additionally, weren't the ocean carriers estopped from asserting the bar of COGSA in this suit because of the fraud they perpetrated in the prior timely brought suits? Weren't these factors required to be tried? The applicable decisions of this court say these factors should have been tried.

3. The fourth cause of action that

was dismissed was a count alleging "Frauds upon the courts" in three prior suits for this claim. Plaintiff claimed damages. The suit was wrongfully dismissed because issues of fact were presented and especially that "scienter" is an element which must be tried. The decision of the Court of Appeals apparently did not appraise properly the effect of Marshall v. Homes, 141 U.S. 589 upon the case of the United States v. Throckmorton, 98 U.S. 61. This court's power of supervision would be extremely useful in settling the issues raised by the Court of Appeals decision. There are several cases of the Second Circuit that seem to be at odds on the question of what part extrinsic fraud now plays in view of the provisions of Rule 60(b3) which seems to have eliminated the operation of the distinction between intrinsic and extrinsic frauds. Even whether the distinction operates in plenary suits should be settled. This cause would provide a catalyst for all of the foregoing questions.

4. The last of the five causes of action, the fourth in the complaint, was tried, without a jury, despite the fact that a demand for a jury was inscribed upon the summons and complaint when served upon the defendants, charterers and shipowner in early November 1980, and as the claim was to recover money damages for a breach of contract, the trial was a violation of the Seventh Amendment to the United States Constitution.

5. The district court's dismissal of the suit on the guarantee, without prejudice, was based on a finding that a final judgment on

the basis of the Appellate Court's decision was not entered. The guarantee was given to stay execution upon a judgment to be appealed. It stated that the guarantee would pay "pursuant to a final decision of a German court". The court erred in reading that finding in the guarantee and in holding that such a failure was chargeable to plaintiff instead of defendants because the idea of a "final judgment" was advanced by defendants. There is no issue raised in the pleadings that a "final judgment" was a pre-condition for the promise to pay to accrue. The issue according to the only pleadings filed is whether the decision of a German court had followed on the appeal from the June 15, 1971 judgment. The decision of the Appellate Court of January 9, 1975 was the decision upon the appeal from the judgment of June 15, 1971. The Appellate Court decision would and did accrue the promise to pay and the failure to pay was the breach of the guarantee. This completed plaintiff's prima facie case under the pleadings. The damages could have been fixed at the trial but were not. That was an abnegation of the trial court's jurisdiction to make the decision according to the facts. Failing to exercise its jurisdiction is constitutionally impermissible.

6. Wasn't the recognition that plaintiff was owed money from the defendant Newcastle an admission that plaintiff was entitled to recover? Wasn't the refusal to accept the

fact that the failure to pay was a breach of contract, a refusal to accord the plaintiff due process or the equal protection of the laws?

7. The district court's attention was called to the fact that the exhibits before the court showed that defendant's insurers had agreed with their German counsel to misstate the fact that Mr. Kruse had authority from Mr. Burns to bind the shipowner to the extension of time to sue to May 15, 1961, and that they were advancing the untrue claims that he did not have that authority and did defraud and deceive the Appellate Court to render its decision of January 9, 1975 which dismissed the suit as against the shipowner. The letters proving the agreement to lie rendered the judgment null and void. Hence, while that decision had accrued the promise to pay the guarantee, it could not be said that it had standing to pronounce the amount due. Plaintiff was not obliged to accept $33,000. and suggested to the court that he fix the damage. The district court has power to apply quantuum meruit as the basis for a decision fixing damages. When it refused and said "without prejudcie" wasn't it avoiding doing its duty according to law? Wouldn't it be important to correct the district court's action in the interest of justice? The majority opinion, too, should be overruled and the minority's rule that plaintiff had the right to bring suit on the guarantee after the Appeal Court published its decision should be established as the rule for this case, if a trial is required.

8. Didn't the district court deny plaintiff the due process guaranteed by the Fifth Amendment in arbitrarily dealing with the facts of this case, in picking and choosing as controlling and dispositive certain of the facts and denying its consideration to other facts on a motion to dismiss, in refusing to deal with the false facts stated by defendants in their briefs on the motion to dismiss when they claimed that Newcastle had a lien on the recovery upon plaintiff's proceeds in the German judgment by reason of a claim for an offset against the plaintiff which should be tried and yet those claims were made without their having been pleaded by defendants in their answer to the complaint and there was no such issue pleaded or raised, and objections were filed by plaintiff to a trial of such an issue without pleadings, and the proof made was that Newcastle did not have the offset claimed, nor did it have the lien claimed. These facts were proven to the court by proof made by conceded and admitted facts. Shouldn't the Court of Appeals have used its power to correct such an abuse of discretion?

Furthermore, wasn't the proof by plaintiff that the attachment filed by Newcastle against the proceeds of the German court without right of offset, proof of the truth of the falsity in the papers said defendant Newcastle had filed in the German court, and by the same token, wasn't the contrary claim of the defendants in their briefs false and submitted with the intent to defraud the

district court to effectuate the denial of plaintiff's claim by the district court and the plaintiff's complaint against such fraudulent tactics, having been ignored by the court, wasn't such action contrary to the applicable decisions of this court on the point?

9. Wasn't the majority opinion in ignoring the foregoing state of facts, a denial of due process and contrary to the true administration of justice, because it placed an unduly great weight to the district court's decision in the face of the obvious errors in it, called to its attention.

INDEX TO WRIT

	Page
PETITION	1
OPINIONS BELOW	2
JURISDICTION	2
QUESTIONS PRESENTED	2
STATUTES INVOLVED	7
STATEMENT OF THE CASE	8
REASONS WHY THE WRIT SHOULD BE GRANTED	19
CONCLUSION	47

INDEX TO APPENDIX FILED TO THIS PETITION

SUMMONS	A-1
COMPLAINT	A-2
DECISION ON MOTION TO DISMISS	A-26
DECISION AFTER TRIAL	A-52
OPINION AND JUDGMENT OF COURT OF APPEALS	A-55
MAJORITY OPINION	A-55
DISSENTING OPINION	A-73
AMENDMENT TO ABOVE OPINIONS	A-80
ORDER DENYING REHEARING	A-82
GUARANTEE OF NEWCASTLE PROTECTION & INDEMNITY ASSOCIATION	A-83
JUDGMENT OF GERMAN TRIAL COURT DATED JUNE 15, 1971	A-84

CITATION TO CASES

		Page
1.	ACL v. Watson, 327 U.S. 582	29
2.	Adikes v. S.H. Kress Co., 398 U.S. 144	30
3.	Angerosa v. White, 248 App.Div. 429	26
4.	Aquascutum v. S.S. American Champion, (2C.A.) 426 F.(2) 207	27
5.	Beacon Theatres Co. v. Westover, 359 U.S. 500	21
6.	Bouie v. Columbia, 378 U.S. 347	44
7.	Brinkerhoff-Faris v. Hill, 281 U.S. 623, 681	30
8.	Burbrooke Mfg. Co. v. St. George Textile Corp., 283 App. Div. 640	43
9.	Carter v. Stanton, 405 U.S. 669	30
10.	Chicago R.I.&P. Rwy. Co. v. Calicotte, 267 F. 799	27,43
11.	Conley v. Gibson, 355 U.S. 41	31,44
12.	Dairy Queen Inc. v. Wood, 365 U.S. 469	21
13.	Di Pinto v. Provident Security Life Insurance Co., 323 F.(2) 826	21
14.	Dioguardi v. Durning, 339 F,(2) 774	31
15.	Edwards v. Kearsey, 96 U.S. 595	29
16.	Gaines v. Fuentes, 92 U.S. 10, 23 L.ed. 524	27

		Page
17.	Gardener v. Toilet Goods Association, 387 U.S. 167	32
18.	Great Coastal Express Inc. v. International Brotherhood of Teamsters, 86 F.R.D. 137	43
19.	Griffith v. Bank of New York, 147 F.(2) 890 (ECA)	27,41 & 43
20.	Greater Boston Tel. Corp. v. F.C.C., 463 F.(2) 268, 278	43
20a.	Hall v. Cordell, 142 U.S. 116, 12 S.ct. 154, 55 L.ed. 956	28
20b.	Hart v. B.F. Keith Vaudeville Exchange, 262 U.S. 271, 43 S.Ct. 540	31
20c.	Hazel Atlas Co. v. The Hartford Co., 322 U.S. 238	42
21.	Herbert v. Lando, 441 U.S. 153	41
22.	Hickman v. Taylor, 329 U.S. 495	46
23.	Hilton v. Guyot, 159 U.S. 113	25,40,43
24.	Hodge v. Huff, 140 F.(2) 686-688	43
25.	Hume v. Scruggs, 94 U.S. 22	27
26.	Ingravallo v. Poole Shipping Co., (G.D.N.Y.) 246 F. Supp. 334	27
27.	In re Murchison, 249 U.S. 123, 135	27,43
28.	Internatio & Rotterdam Inc. v. Thomsen, 218 F.92) 218	35
29.	Kenner v. Comm. of Int. Rev. (CA7, 1968) 387 F.(2) 689, cert. den. 93 U.S. 841	42
30.	Kupferman v. Consolidated Research & Mfg. Co., 459 F.(2) 1072	40

		Page
31.	Lent v. N.Y. & Maine R.R. Co., 130 N.Y. 501	23
32.	Marshall v. Holmes, 141 U.S. 589	3,26,42, 43,46
33.	Merchants Bank v. State Bank, 10 Wall. 604	29
34.	M. W. Zack Metal Co. v. Birmingham City, 291 F.(2) 451	35
35.	Nebraska Free Press v. Stuart, 427 U.S. 539	29
36.	Ore Steamship Co. v. Hassel, 137 F.(2) 328	35
37.	Pointer v. Texas, 380 U.S. 400	44
37a.	Poller v. Columbia Broadcasting Co., 368 U.S. 464	30
38.	Publicker v. Shallcross, 106 F.(2) 946	27,43
39.	Radovich v. National Football League, 352 U.S. 445, 77 S. Ct. 390, 1 L.ed. 820	31
40.	Randolph v. Foster, 3 E.D. Smith (N.Y.) 648	24
41.	Rochin v. Calif., 362 U.S. 162	30
42.	Ross v. Bernhard, 396 U.S. 531, 538-541	21
43.	Ross v. Preston, 292 N.Y. 456	43
44.	Sartor v. Arkansas, 321 U.S. 628	29
45.	Schlangenhauf v. Holden 379 U.S. 104, 114	46
46.	Schoenbaum v. First-brooke, 409 F.(2) 200, reh. p. 215, (CA2m 1968), cert. den. sub nom Manly v. Schocenbaum, 395 U.S. 906, 89 S.Ct. 1747, 23 L.ed. (2) 219	30

		Page
47.	Scudder v. Union National Bank, 91 U.S. 406, 23 L.ed. 245	28
48.	Serzysko v. Chase Manhattan Bank, 461 F.(2) 699	46
49.	Simler v. Conner, 372 U.S. 221	21
50.	Stoll v. Gottlieb, 305 U.S. 165	45
51.	Sutter v. Easterly, 354 Mo. 282, 162 A.L.R. 437	43
52.	Union National Bank v. Chapman, 169 N.Y. 538	28
53.	United States v. Alleghany County, 322 U.S. 174, 189, 191	29
54.	United States v. New Wrinkle Inc., 342 U.S. 371, 72 S.Ct. 350, 352, 96 L. ed. 471	33
55.	United States v. Throckmorton, 98 U.S. 61	3,46
56.	U.S. Industries v. Anderson, 579 F. 2) 1223	24
57.	Universal Oil Products Co. v. Root Refining Co., 328 U.S. 578	41,42
58.	U.N.R.R.A. v. S.S. Mormacmail, 199 F. Supp. 552	35
59.	Verplanck v. Van Buren, 76 N.Y. 247	43
60.	Walker Process Equipment v. Food Mach. & Chem. Corp., 382 U.S. 172, 86 S. Ct. 347, 15 L. ed.(2) 247	32

SAME CAPTION AS COVER PAGE

The petition of M. W. Zack Metal Co. through its attorney, ANTHONY B. CATALDO, for a Writ of Certiorari to review the judgment and orders of the United States Court of Appeals of the Second Circuit entered on the 12th day of April, 1982, respectfully shows.

STATEMENT UNDER RULE 28.1

Petitioner has no parent company nor does it have a subsidiary or other affiliated company.

OPINIONS BELOW

The opinion of the Court of Appeals which has not yet been reported, appeas in the appendix set forth hereto. There were two decisions by the District Court of the Southern District of New York. They have not been reported but are a part of the appendix hereto.

JURISDICTION

The judgment of the Court of Appeals for the Second Circuit was entered on April 12, 1982. A timely petition for re-hearing en banc was denied on June 4, 1982, and this petition for Certiorari is being filed within ninety days of that day. This court's jurisdiction is invoked under 28 U.S.C. Section 1254(1).

STATUS INVOLVED

The Carriage of Goods by Sea Act ("COGSA") 46 U.S.C. Section 1303(6) which in pertinent part reads as follows:

"Section 1303' Responsibilities and liability of carrier and ship: * * *.

(6) Notice of Loss or Damage; Limitation of Actions * * *

* * * In any event the carrier and the ship shall be discharged from all liability in respect of loss or damage unless a suit is brought within one year after delivery of the goods or the date when the goods should have been delivered: * * *."

N.B. The next page is p. 5. The questions presented have been removed to the front of the petition.

in respect of loss or damage unless a suit is brought within one year after delivery of the goods or the date when the goods should have been delivered: * * *."

STATEMENT OF THE CASE

This suit is essentially one in admiralty for cargo damage to a shipment of steel coils used for the manufacture of automobile bodies. The steel was purchased by plaintiff in 1960 from a steel mill in Austria and was shipped to Antwerp for loading on board a vessel there called "SEVERN RIVER". There were 93 coils in the whole shipment, weighing 443.1 metric tons. They were placed on board the SEVERN RIVER which was owned by defendant International Corporation of Monrovia and chartered by the defendants Hans H. Jansen and Jurgen K. Krafft of Hamburg, Germany, doing business as Jansen & Company, who in turn was doing business as Contam Linie and the latter issued bill of lading on their own form, but had it signed on behalf of the master of the vessel by Furness Withy & Co., ship's agent at the loading port of Antwerp. The bill of lading is numbered 35 dated January 16, 1960 and states that the steel was received on board in good order, and on its face the bill expressly states "Clean on Board". The bill also states that the cargo will be discharged at New York, its declared destination.

Concedely, the steel arrived in damaged condition. It was stored in bond, when

upon it's being sighted by plaintiff's customer, the customer refused delivery of it. The steel was left in bond and a buyer for it as sound steel was sought but no buyer would buy it as sound steel. In May 1960, upon agreement of all parties in interest, including the shipowner and charterer, the steel was sold "as is, where is" for $42,972.98, C.I.F. New York. The conceded measure of damage is the sound value of the steel at time and place of delivery plus expenses of handling the damaged steel less the value of the steel in damaged condition at the same time and place of delivery. An arms-length sale of the steel in damaged condition is usually accepted as the value of the steel in damaged condition.

Consequently, plaintiff followed these precepts to establish the loss. After deducting the expenses of the sale and of handling the damaged steel, there was a net of $30,000. remaining from the purchase price in damaged condition. The sound market value was approximately $117,000. or $118,000. This created a loss of approximately $79,000. The plaintiff has sought recovery of this loss from these defendants since the date of delivery, February 16, 1960, but it has never been collected. Plaintiff instituted four suits before this one. In three, there have been non-suits that did not reach the merits. In the fourth, there was a judgment for plaintiff after trial; but that judgment has not been collected to date. It was believed that this suit

would have produced a judgment that could have been collected upon, but the dismissals of the Trial court prevented the collections.

In early 1961, anticipating a one-year time for suit to expire as is stated in COGSA, plaintiff requested of the ship's and charterer's agent at New York, the Oceanica Company of Canada, Inc., to grant an extension of time to sue to May 15, 1961. A letter was written to that firm dated January 27, 1961 requesting said extension of time from the vessel and the charterers. While awaiting the return of the letter, the plaintiff on February 11, 1961 filed its libel in admiralty in the Southern Disrtict of New York naming the charterers and the vessel as respondents. After the filing of this libel, the plaintiff received, the letter from the New York agent of the ship and charterer extending plaintiff's time to sue to May 15, 1961. The charterers were insured for their charterers liability by defendant, Newcastle, and the shipowner was insured by defendants, London Steamship. Settlement talks were unsuccessful and time to sue was again approaching the May 15, 1961 deadline.

On May 13, 1961, plaintiff commenced suits in the District Court of New Jersey, and in the Eastern District of New York and in the Court of Hamburg, Germany. The two suits in the United States Courts were exactly the same as the suit in the Southern District County Court of the Southern District filed February 11, 1961. The last suit named the charterer and shipowners, was

an in personam suit, pursuant to the law of Germany.

Some time in 1961, the New York agent of the charterer and ship, Oceanica Company of Canada, Inc., discontinued its business and offices in New York and it seemed to have disappeared from the New York business scene. Processy in the suits in this country could not be served as there was no one on this side of the ocean to receive it. The suit in Germany was prosecuted according to German practices and rules and a first judgment was rendered on May 15, 1966, holding the charterers liable but withholding the fixation of damages until later. On June 15, 1971, the German Court made its second decision, this time awarding damages of $64,018.05 against the charterers. On December 7, 1971, a third judgment was made awarding the plaintiff the same judgment of $64,018.05 against the charterer and the shipowner, but it limited the execution upon the judgment as against the shipowner to levy upon the SEVERN RIVER, which the court said in the same judgment, was then sailing the high seas and was amenable to such execution. This limitation upon the execution was made in accordance with German law. It is subject to change if the ship was found not amneable to levy. In fact, she had foundered on rocks in the Far East and was withdrawn from navigation some three years before the decision. This fact had been withheld from the trial court and the parties, instead counsel for defendants (representing the charterer and shipowner at the request of their respective insurers) requested

the court to limit the execution to the vessel.

Appeals were filed and the charterers requested a stay of execution pending appeal. It's insurer, Newcastle, offered its written guaranty to pay the judgment appealed from "pursuant to a final decision of the German Court".

The shipowner refused to file an undertaking because no levy could be physically made upon the SEVERN RIVER. Plaintiff feeling free to enforce that judgment against the owner moved against a sister-ship, the Virtus, which was putting into Norfolk in April 1972, which was arrested upon a complaint in admirably on the original cause of action plus allegations of the entry of the judgment in Germany on December 7, 1971. The owner moved to quash service of process, but in some manner, the court treated the motion as one for summary judgment against the protest of the plaintiff. The court rendered a long opinion, not reported, dismissing the action on the grounds of res judicata, there was another action pending for the same cause, the bar of COGSA, and that the German judgment was an "in rem" judgment and it could not be sued upon against the owner. An appeal was taken to the Fourth Circuit Court of Appeals which rendered its decision dismissing only upon two grounds and disregarded the others. Those two grounds were the time bar of COGSA and that the judgment was only an "in rem" one. A few days later, the Appeal Court of Germany rendered its decision of January 9, 1975. That judgment reduced the recovery against the charterer to

$33,000. and as to the shipowner, it dismissed the claim saying that the one year limitation of the German Commercial Code will be applied to dismiss the action of the shipowner because the court found that the shipowner's agent in New York did not have authority from the owner to extend the time to file suit to May 15, 1961. For this reason the court held that the start of that suit on May 13, 1961 was untimely according to the German Commercial Code.

Upon receipt of the German Appeal Court decision, plaintiff moved the Court of Appeals to reargue, offering that decision, to claim that whether the jdugment of December 7, 1971 was "in rem" or not was rendered moot, and, that its finding that the suit in Norfolk upon the original cause of action was time-barred was incorrect by reason of the plaintiff/start of the suit in New York before the expiration of one year limitation. The Fourth Circuit granted the motion to the extent of withdrawing the defense of the time-bar to COGSA, saying plaintiff is free to start suit, but it refused to remand the case on the original cause of action because it said that plaintiff had declared on the judgment, it could not now change its mind. A petition for certiorari was denied. The plaintiff sought to restore the suit in the District Court of New Jersey to the docket. That case had been dismissed without prejudice for lack of personal jurisdiction over the respondents. Plaintiff also sought an amendment to the libel to change the respondent SEVERN RIVER to her owner. The Court would not

pass upon the application, exparte; it requested plaintiff to bring in the shipowner. The shipowner had a representative at Baltimore, Maryland named Tidewater Commercial Company. The motion papers were sent to them with the explanation that the court had requested the shipowner's appearance to state their position with respect to the motion papers, which were enclosed. Tidewater turned the motion papers over to La Morte Burns & Company, the representative of the insurers at New York, who employed Newark counsel to appear for the shipowner to argue against the motion. Counsel then appearing specifically for the shipowner only, argued against restoring the case, claiming res judicata against the charterer and the shipowner, that COGSA's limitation of one year expired. The res judicata was effective by the judgment in Germany. Both arguments were not true. In fact, the suit had been timely started and its start had been communicated to Mr. Burns of La Morte Burns & Company in early May 1961 when they had offered plaintiff a further extension of time before May 15, 1961. The court denied the motion altogether because of the time-bar. Appeal to the Circuit Court of Appeals ended in affirmance, no opinion, and certiorari was denied.

In retrospect, it became clear that defendants were represented by their insurers. The latter appointed the attorneys chosen to work for the insureds' interest and who thought nothing of advancing untrue fact statements to the courts and causing such untruths to be accepted as dispositive of the case. That action was "Fraud upon the court"

starting with the limitation upon the judgment against the shipowner of December 7, 1971 which limited the levy of execution upon a vessel which had sunk and was withdrawn from navigation. Later, to the Appeal Court the same counsel argued that the extension of time to sue to May 15, 1961 was signed by an agent who did not have authority to sign for the owner when the truth was that Oceanica of Canada was the ship's agent at discharge at New York on the occasion in question, and Mr. Kruse of that firm had obtained permission to sign the extension for the owner and for the charterer from Mr. Burns, the New York representative of the insurers for the owner and for the charterers. Mr. Burns had the authority from their principals to sign such extension in the regular course of their defense of cargo damage claims. Mr. Burns so testified on a deposition which was offered by the defendants into evidence of the trial of the case. The dismissal by the German Appeal court of that cause of action rendered its decision null and void.

Then counsel for the owner in the Norfolk suit was appointed by the same Mr. Burns. He argued that the judgment limiting the execution to the SEVERN RIVER was an "in rem" judgment according to German law and offered an affidavit by the same German counsel who represented the owner and charterers in the German courts,to that effect. Whereas the vessel was not a party to the suit in Germany nor was it in the custody of the court at any time, and the law of Germany is that when the liability against the owner is limited to a levy

against the vessel, and such levy could not be made, it may be changed to a judgment leaviable upon the general assets of the debtor. This action, too, was a fraud upon a court.

Then, in the New Jersey court, it has been explained how that court accepted the untrue claims of defense counsel of a time bar and res judicata; (an unpaid judgment cannot be res judicata). These untruths were advanced by officers of the court, lawyers appointed by the insurance companies, for the purpose of procuring the judgments in favor of the defendants. These consistent actions did prevent the collection of a claim admittedly valid, and cause this litigation to recover for the plaintiff. This action was started in August 1978, stating five causes of action, the fifth count being to recover damages in a plenary action in equity to set aside the previous judgments for fraud upon the court perpetrated by defendant's insurers, Newcastle Protection & Indemnity Association and London Steamship Owners Mutual Insurance Association Ltd. making themselves and their principals liable to plaintiff in fraud.

The five causes of action in this complaint were:

The First was the ordinary cargo damage claim against the joint tort-feesors, ship and charterer.

The second and third causes of action was against the insurers, for plaintiff to recover upon their separate policy of insurance to the charterers and owners as third party beneficiaries.

The fourth cause of action was on a written guarantee of Newcastle promising in exchange for a stay of execution on the German trial courts' judgment against charterers of June 15, 1971 for $64,018.05, to pay "pursuant to a final judgment of a German court". See A-1 et seq's Appendix.

The fifth cause of action was a detailed account of the foregoing actions of "Fraud upon the courts" seeking vacation and for the frauds of all defendants.

All counts but the fourth were dismissed on a motion under Rule 12(b) by the trial court. It said that the fourth cause of action was to be sent to trial, without a jury, on a question that was not theretofore raised in the pleadings. In ordering that cause to trial, the court said, "the guarantee was not due because the decision of the German Appellate Court was not reduced to judgment, and second, even if it has, Newcastle holds a valid lien on part of the award due Zack. Questions of fact and law are thus presented * * *."

Plaintiff objected to this issue, but the court ignored the objection. The defendants did not replead this counter-claim.

On the motion to dismiss, defendants stated without proof that Newcastle had a lien on the proceeds of the judgment in Germany on a lien against those monies against Zack. Neither of these claims were true. Plaintiff ordered proof concedely and admittedly copies of documents received from defendants' file, but the court ignored the proof. This finding of an issue without pleading was vio-

lative of constitutional due process.

At trial plaintiff proved the guarantee, the judgment appealed from of June 5, 1971, the affirmance as to the charterer by the decision of the appellate tribunal dated January 9, 1975 and the fraud committed upon the appellate court to obtain the dismissal as to the shipowner. The proof of the latter, consisted of letters passing between counsel and the defendants' insurers in preparation for the appeals, discussing the effort at making this claim because Mr. Kruse, the manager of the Oceanica Company of Canada at New York, had disappeared from the business scene and was not available for testimony in court. The trial court dismissed the fourth cause of action without prejudice saying that there was no question that the defendants Newcastle owed money to the plaintiff, but, it said that because there was no proof of the amount of a judgment entered in the German trial court upon the Appeal Court's decision it could not assess damages. It refused plaintiff's proof of the dismissals by a vote two to one. The minority would reverse because of fact questions raised on the fraud count and because the promise of Newcastle under its guarantee had accured on the handing down of the Appellate Court's decision of January 9, 1975.

The affirmance was a repeat of the decision of the trial court except that it changed that trial court's ground of dismissal of the fraud count that it had no jurisdiction since such a pending action would have to be brought in the court where the fraud was perpetrated, to one that plain-

tiff had lost its rights to complaint about the fraud when it did not attack that action in the court where it was committed. Both reasons are unlawful. They contradicted the decisions of this court and of other circuits. No authority or point was cited by either court on their respective reasons.

Also, on the trial of the fourth cause of action, the defendant offered no proof of an offset due Newcastle from Zack and no lien as it had claimed on the motion. Instead, out of caution, plaintiff showed that Newcastle had filed an attachment of the proceeds owed Zack on the German judgment on a claim of an offset arising from an assignment to Newcastle of Federal Insurance Company's rights against Zack. Plaintiff also produced the assignment and it read that Federal had assigned its rights to the charterers and shipowner and not to Newcastle. This was proof of fraud upon the court to prevent plaintiff from collecting on that judgment. At the same time, it proved that there was no valid lien in favor of Newcastle and no offset. This lack of proof was a defendants' lack of proof for it was defendants who had advanced the issue. And it was proof positive that there was no necessity to enter the judgment stated by the court for the guarantee plainly read that Newcastle would pay "pursuant to a decision" that had been made.

REASONS WHY THE WRIT SHOULD BE GRANTED

1. Because of its transcendental importance the failure of the District court to order the fourth cause of action to a trial by jury

requires summary reversal or the grant of the Writ. That cause of action was on a written contract of defendant, Newcastle that it would pay the sums plaintiff would be entitled to "pursuant to a final decision of a German court."* upon the appeal of the charterers from the trial court's judgment of June 15, 1971 for $64,018.05 to plaintiff, in exchange for plaintiff's promise to refrain from levying execution against the charterers pending appeal. Plaintiff clearly performed its promise in full. The decision on appeal was rendered but, Newcastle did not pay. That was a breach of the contract and such is the normal common-law action to recover money damages. Such causes of action are guaranteed a trial by jury under the Seventh Amendment which reads as follows:

> "In Suits at common-law, where the value in controversy shall exceed $20.00, the right of trial by jury shall be preserved * * *."

The plaintiff's demand for a jury was inscribed on the summons and complaint (p.1A appendix) which was served on defendants, the charterers and the shipowners, early in November 1980. On February 18, 1981, the court directed the fourth cause of action to be tried before it without a jury. This last provision was objected to by plaintiff but the court denied. The trial was commenced on April 1, 1981 by the court without a jury.

Ordering this claim to be tried without a jury even if the case stated multiple claims, one or more of which were claims to be tried without a jury, the court must nevertheless, preserve the jury trial. A district court must

*p. 83a of Appendix

be aware that the Supreme Court has passed on many cases holding that the jury trial shall be preserved on a common law cause of action. See Di Pinto v. Provident Security Life Ins. Co., 323 F.(2) 826; Beacon Theatres Co. v. Westover,359 U.S. 500; Dairy Queen Inc. v. Wood, 369 U.S. 469, and Ross v. Bernhard, 396 U.S. 531, 538-541. In Ross, the Supreme Court quoted from Beacon Theatres and Dairy Queen cases as saying;

> "Where equitable and legal claims are joined in the same action, there is a right to jury trial on the legal claims which must not be infringed either by trying the legal issues as incidental to the equitable ones or by a court trial of a common issue existing between the claims."

It also stated "The Seventh Amendment question depends on the nature of the issue to be tried rather than the character of the overall action. See Simler v. Conner, 372 U.S. 221". These authorities state the Constitutional violation very well. Ignoring them was wrong and this court is respectfully asked to reverse summarily or to grant the writ.

2. As to the decision after trial of the fourth cause of action, that, too, is violative of the constitution, the due process clause found in the Fifth Amendment.

Simply put, the trial court said at the conclusion of plaintiff's case it would not award damages but would have to dismiss the count without prejudice, because "* * * it is apparent that something is owed to the plaintiff by the de-

fendants and of that there would be no question". The court then went on to say, p. A-53,

> "However this is a court of law. The guarantee speaks in terms of a final judgment, final decision and there has been no evidence submitted to this court as to what the amount of that final judgment is. It may well be that the determination of the Hanseatic Provincial Court is in fact a final judgment, but no evidence has been submitted and no briefs have been submitted and no German law has been submitted to substantiate that proposition."
> * * * grant the motion to dismiss for failure to establish the amount, the entry of or the amount of a final judgment in the German Courts." (A-53)

Note the single idea fixed in the court's mind is that proof had to be made of the final judgment including the fixation of costs in the trial court. Whereas, the guarantee has nothing to say of such an event, but as stated above the guarantee says it will pay pursuant to a final decision of a German court order.

Two arbitrary questions arise by such a finding.

a. The pleadings as written and not otherwise amended would require plaintiff to prove that the decision contemplated by the guarantee to accrue the promise to pay was that of the Appeal Court on the appeal from the judgment of the trial court dated June 15, 1971. The decision of the Appeal Court was the decision of January 9, 1975 for it dealt with the appeal for the judgment below. That plainly follows from a

reading of the guarantee itself, and, if an ambiguity arises, as the instrument was written and provided by the defendants, the interpretation must be that which favors plaintiff's interpretation. The minority opinion says so (A-75). Also see Williston on Contract, 3rd ed., Section 600A, at pp. 302-303 forbidding a court from adding words for a scrivenor to make the contract as he, at a trial, says was meant to do. See also Restatment of the Law, Contract, Sections 226, and 236, and Simpson on Contracts, 2nd ed., at p. 209 where the author states that it is a Primary Rule of Interpretation. Then Williston at Section 621 says that the first rule of the Secondary Rules is that the language will be contrued most strongly against the party writing it.

The court failed to read that the condition of payment was "a final decision of a German court" and not a final judgment after the costs had been ascertained and the final award of a judgment plus costs was entered. The costs could have been ascertained and judgment entered here, because the failure to pay under such an undertaking was a breach of contract, see Lent v. N.Y. & Maine R.R. Co., 130 N.Y. 501, 510 where the Court of Appeals speaking of when a contract to pay money on a condition is breached said that the breach occurs when the condition arises and there is a failure to pay. It added that the court must, if necessary, then go to the assessment of damages. It was plain error of the court to add the words "final judgment after costs are determined" to the

guarantee.

b. The district court further erred in using that terminology and placing the burden of proving that unlawful condition upon plaintiff rather than the defendant who in its brief on the motion to dismiss claimed that the condition was a part of the undertaking and that Newcastle had a lien for an offset upon the proceeds of the German judgment. The court then ordered a trial on the question of the lien on the offset, but it did not understand that defendants had not pleaded the offset and lien as a counterclaim (A-45), that no such issue could proceed to trial without amendment to the pleadings and that plaintiff objected to that kind of amendment without given it an opportunity to plead its views in defense to such a claim. See U.S. Industries v. Anderson, 579 F(2) 1223, where that court said that going to trial on an issue raised on a motion was unconstitutional as the party adversely affected had a right to be confronted with proper pleadings to establish the nature of the new issue to be tried, which would fix the burden of proof upon that issue. See also Randolph v. Foster, 3 E.D. Smith (N.Y.) 648. The trial court proceeded to lay the burden of proving upon plaintiff, to show that what defendant had claimed in a brief, was wrong. Even if the new issue raised by defendants should have been tried, plaintiff's burden was still the proof of the allegations of its complaint. This it did by proving the execution and delivery

of the undertaking, the judgment appealed from and the fact that the judgment was affirmed by a decision of the German Appeal Court. A most peculiar action was taken by the court when plaintiff had proven that the Appeal Court decision dated January 9, 1975 had affirmed the judgment appealed from. The plaintiff had read from an English translation of the German Appeal Court's decision, which was served upon plaintiff in the action in the New Jersey District Court by defendant. Plaintiff had marked it for identification only, as Exhibit 3. The court wanted plaintiff to place it in evidence. Plaintiff refused to do so. The court then said well, let's mark it as a court exhibit. Plaintiff objected, saying if the defendants want it in evidence, let them offer it. Plaintiff would object to it as not a valid judgment, since it had been obtained by fraud. Hilton v. Guyot explains the use of a judgment that is void for fraud as permitting the party defrauded to read facts that are admissions against the interest of the defrauded. Plaintiff had read what he needed out of it after marking it. Otherwise it was objectionable because not only was it an unsworn English version supplied by defendants but also because the judgment was null and void as obtained by "fraud upon the court". This claim plaintiff would have pleaded had the defendant's answer been amended. The court took the paper from plaintiff and personally handed it to the stenographer as its own exhibit, but he also told the stenographer to mark it as

Plaintiff's Exhibit 3. The facts of the plaintiff's claim of fraud upon the Appeal Court is stated in the "statement of the case" above. Though the fraud perpetrated had to do with the defendant's false claim that the extension of time to sue was void and the court accepted that false argument and caused the complaint to be dismissed as to the shipowner, yet, the fraud violated everything that was intended by that fraud, see Angerosa v. White, 248 App. Div. 429. In such circumstances plaintiff could object to the judgment as null and void, but it could read from it an admissions against defendants' interest, it found necessary, see Hilton v. Guyot, 159 U.S. 113, 199, 201. This rule would have been of invaluable aid to plaintiff's case as it could then object to that Appeal Court's reduction of the judgment to $33,000. That reduction was found by the German Courts upon its own reading of Cogsa, that 66 coils were found damaged. Cogsa is not read that way in this country. The rule is that the limitation of $500 per package is applied to the whole shipment and not to the packages damaged. At any rate, as a judgment obtained by fraud it is null and void, it is not enforceable, see Marshall v. Holmes, 141 U.S. 589, 62 S. Ct. 62, 35 L. ed. 870; Hilton v. Guyot, supra; 7 Moore's, Fed Practice, pp. 607, where it says that fraud renders a judgment a nullity, at p. 621, Moore repeats that rule; at p. 644 where he says that jurisdiction to nullify such a judgment is in any Federal Court, where personal jurisdiction

may be obtained; at p. 801, et seq., where he discusses the collateral attack upon a fruadulently obtained judgment. See also the following cases all dealing with fraud action brought in the Federal Courts, Gaines v. Fu'entes, 92 U.S. 10, 23 L. ed. 524; Griffith v. Bank of New York, 147 F.(2) 890 (CA2); Hume v. Scruggs, 94 U.S. 22; In re Murchison, 249 U.S. 123, 135; Chicago R.I. & P. Rwy. Co. v. Calicotte, 267 F. 799 and Publicker v. Shallcross, 106 F.(2) 946.

Because of this rule, plaintiff had proceeded expecting to prove the damages for the lack of the guarantee by proving the actual damages sufferd of $79,000 - 80,000. or of reverting to the judgment of June 15, 1971 appealed from of $64,018.05. This last, it was agrued, would be reverting to a judgment already decided upon the merits. The later but fraudulent judgment would be set aside, see the Civil Practice Law & Rules of New York, Section 5015(c) which permits reversion to the prior judgment. New York law would be applicable, anyway, because the contract of the parties to the carriage of goods says that delivery shall be at New York. The law of New York would be the place of performance and its laws would be applicable. The law of performance in contracts is where discharge is to take place; see Aquascutum v. SS. American Champion, (2 C.A.) 426 F.(2) 207, and Ingravallo v. Poole Shipping Co., (EDNY) 246 F. Supp. 334. It is well settled in Conflict of Laws that the place of performance is the law to be applied to

contracts, see Goodrich Conflict of Laws, p. 342, citing Scudder v. Union National Bank, 91 U.S. 406, 23 L. ed 245; see also Union National Bank v. Chapman, 169 N.Y. 538, and cases cited; and see Lorenzen, Cases on Conflict of Laws, at page 450, et seq. See also, Hall v. Cordell, 142 U.S. 116, 12 S. Ct. 154, 55 L. ed. 956, stating that the place of performance is the law applicable. Stumberg on Conflict of Laws, at p. 282 says the same principle is applicable, especially, it says, where a single act is the performance. Section 5015 CPLR is applicable. Not only does subdivision (3) eliminate the distinction between extrinsic and intrinsic fraud in all events where an attack is made upon a judgment so obtained, but subsection (c) grants the party defrauded the right to resort to a prior judgment as its remedy when the fraudulent judgment is nullified. This rule was briefed for the trial court but the trial court ignored it and the Court of Appeals ignored the error of the trial court. It was plain that both courts would not apply the rule of law to the proven facts of this case.

4. The dismissals of the four counts on the motion to dismiss (A-26) was erroneous because issues of fact were present, which if proven, would entitle plaintiff to a recovery. The motion was required to be denied. To determine the facts and not find if issues were present, is not only contrary to the Rule of 12(b), but also, to the cases of this court and of all

Circuit Courts in the land, for which reason the grant of dismissal denies plaintiff due process. In Edwards v. Kearsey, 96 U.S. 595, where at p. 604 the court quoted from its decision in Merchants Bank v. State Bank, 10 Wall. 604, and said "where the facts are undisputed, it is always the duty of the court to pronounce the legal result". Judge Sweet refused to fix the damages where plaintiff's prima facie case was rested on undisputed evidence. At page 607 of the Edwards case the court said regarding the impairment of contract rights; "the trust touching the subject in which this court is charged is one of magnitude and delicacy. We must always be careful to see that there is neither misfeasance nor malfeasance on our part". These words are a far cry from the cavalier handling of the dismissals of this case by the trial court.

The Supreme Court recently followed the foregoing cases by their statement in Nebraska Free Press v. Stuart, 427 U.S. 539, saying; "due process requires that the trial be a fair and impartial one". The judiciary is required to stay within the bounds of its constitutional powers, see ACL v. Watson, 327 U.S. 582, and, it may not disregard the existing rights of litigants, see U.S. v. Alleghany County, 322 U.S. 174, 189, 191. Where creditability and the weight of the statements of the opposing party are in balance, summary judgment may not be granted, see Sartor v. Arkansas, 321 U.S. 620. The court in Sartor said a court "may not withdraw witnesses from cross-examination,

the best method yet devised for testing the trustworthiness of evidence". In Schoenbaum v. Firstbrook, 405 F.(2) 200, reh. p. 215, (CA (2), 1968) is a case having issues closely allied to the issues in the case at bar. Certiorari was denied sub nom Manly v. Schoenbaum, 395 U.S. 906, 89 S. Ct. 1747, 23 L. ed. (2) 219.

Poller v. Columbia Broadcasting Co., 368 U.S. 464 upholds the right to a trial of a claim, except when there is complete absence of any significant probative evidence tending to support the complaint. This is something which Judge Sweet did not do. The plaintiff's asertion to an estoppel to prevent the application of the time-bar to dismiss the first three causes is an example. This case should have stayed the trial judge from ordering a judgment for defendants. The Brinkerhoff-Farris case supra at pp. 681 and 682 deserves reading. The well intentioned Mr. Justice Brandeis talks on due process and the deprivation of it by the judiciary. In Rochen v. Calif., 362 U.S. 162, Frankfurter J., quotes Cardoza J., on due process saying it is a guarantee of respect for those personal immunities which are "so rooted in the traditions and in the conscience of our people as to be ranked as fundamental", see Snyder v. Mass, 291 U.S. 97. Also in Hurtado v. U.S., 410 U.S. 578, the court declared that the failure to follow this statute violates the constitution, and, Carter v. Stanton, 405 U.S. 669 and Adikes v. S. H. Kress Co., 398 U.S. 144 at 157.

It was said by the late Chief-Judge Clarke of this Circuit in Dioguardi v. Durning, 139 F.(2) 774, where Judge Clarke struggled with a pro se complaint and found in the facts a wrong by the New York Port Collector that could be redressed. He reversed the dismissal. He wrote, "giving the plaintiff the benefit of the reasonable intendments in his allegations that he was actually the first bidder at the price for which they were 'sold' stated the wrongful act of the defendant." The honorable court explained:

> "But as it stands, we do not see how his day in court to show what obviously he so firmly believes and what for present purposes must be taken as admitted" could be denied.

Our Supreme Court by Mr. Justice Holmes said that to dismiss, the court must find "the complaint frivolous". Hart v. B.F. Keith Vaudeville Exchange, 262 U.S. 271, 274, 43 S. Ct. 540, 89 L. ed. 977. See also Radovich v. National Football League, 352 U.S. 445, 77 S. Ct. 390, 1 L. ed. (2) 820. In Conley v. Gibson, 355 U.S. 41, the court said that there can be no dismissal where it is not clear beyond a reasonable doubt that plaintiff will be unable to prove a right to relief.

Moore's Fed. Prac., 2nd ed., ¶12.08 at p. 2267 states:

> "But a complaint should not be dismissed for insufficiency unless it appears to a certainty that plaintiff is entitled to no relief under any state of facts which could be proved in

support of them. Pleadings are to be liberally construed. Mere vagueness, or lack of detail is not ground for a motion to dismiss."

Again, the Supreme Court elaborated in Gardener v. Toilet Goods Association, 387 U.S. 167, at page 187; where at issue was the need for enforcement of the review proceedings residing in any agency:

> "There is, of course, no abstract mechanical method for determining the adequacy of review provisions. Where personal status or liberties are involved, the courts may well insist upon a considerable ease of checking administrative orders or regulations."

And at p. 192, the Court went on to say:

> "We cannot say on this record that the burden of such a course is other than substantially accepting, as we must on a motion to dismiss on the pleadings, the allegations of the complaint and the supporting affidavits as true."

This was one of three cases where the Court was divided, the majority held for the importance of a trial to resolve the issues where time was a consideration.

Again the Supreme Court had said in Walker Process Equipment v. Food Mach. & Chem. Corp., 382 U.S. 172, 86 S. Ct. 347, 15 L. ed.(2) 247, at p. 349 of the S. Ct. report:

> "As the case reaches us, the allegations of the counterclaim, as to the practiced fraud upon the government by Food Machinery as well as the resulting damages suffered by Walker are taken as true."

citing U.S. v. New Wrinkle, Inc., 342 U.S. 371, 72 S. Ct. 350, 352, 96 L. ed. 417 (also concerned with allegations of fraud).

5. The dismissal of four causes of action may be considered in two parts. The first encompasses the first, second and third cause of action (A-5 to A-9), but as the second and third follow the first, as they are suits in which plaintiff seeks to hold the insurers to their contract of insurance for the charterers and shipowner, so that the actions against the insurers would have to be reinstated if the first is found wrongfully dismissed. The first cause of action is against the carriers, charterers and shipowner. The dismissal was placed upon Cogsa's limitation that a suit upon a claim against them should be brought within one year after delivery (A-33 to A-38). The delivery was made on February 16, 1960. One year after that is February 15, 1961. The limitation reads 46 U.S.C. Section 1303(b).

> "* * * The carrier and the ship shall be discharged from, all liability in respect of loss or damage unless suit is brought within one year after delivery * * *."

A suit was brought for this loss or damage in the Federal District Court of the Southern District of New York on February 11, 1961. That was before the one year period of Cogsa. Query? Doesn't the commencement of that suit extinguish the incipient right of the carriers to that limitation?

It is noteworthy that the Statute does not compel a suit or the carrier may claim the time-bar, but it creates a right to claim the operation of the bar on the particular claim. May the bar be nullfied if a suit, any suit, is brought before a year elapses from delivery, or, does the bar continue to any case started at any time after the one year period. No case has been decided on this point. The cases cited by the District Court and repeated by the Court of Appeals are cases where the first suit was brought after the expiration of the one year, and of course, no one would quarrel with that. But here four suits were brought before the expiration of the year and the additional time to May 15, 1961 as stipulated. It is important to note that the Statute is talking about a single shipment that has suffered loss or damage.

It would be well if Cogsa is looked at to see what it really means and not resort to name calling as was done by the majority opinion (A-66), saying plaintiff's analysis was frivolous. Resort to grammar will reveal its meaning very well. We find that the subject of that clause is that the carrier will be discharged from liability for loss or damage. Then the next word is "unless". The word "unless" is to effect what purpose? Isn't it to affect the right of the carrier to a time bar? That is what it says. "Unless" is a conjunction meaning according to Webster's Dictionary, "if not, except, when, except that". Applying these synonyms to the Statute and we find that the words

after "unless suit is brought within one year" means that the right will attach if the suit is not brought within one year or except or when the suit is not brought within one year. Again one cannot say that the Statute says that any suit on a claim that is not started within one year but is brought beyond the one year period would be barred. In fact, it says if a suit is brought upon a particular claim within one year, the right does not arise.

Volume 51 of Am. Jur., 2nd, Limitation of Actions, Section 15, states that the Statute of limitation of actions existing at common law had to be strictly contrued. They are not like the limitations in the Suits in Admiralty Act which also creates the right of actions. There are even cases which have permitted a second suit after the first has stopped the running of Cogsa's limitation, see Internatio & Rotterdam Inc. v. Thomsen, 218 F.(2) 218; U.N.R.R.A. v. S.S. Mormacmail, 199 F. Supp. 552; Ore Steamship Co. v. Hassel, 137 F.(2) 328. Also Chief Judge Clarke who decided the Ore Steamship Co. case stated in M.W. Zack Metal Co. v. Birmingham City, 291 F.(2) 451, that a timely started suit even if plaintiff had not yet perfected its title to the goods, prevented the claim for a bar from arising. The emphasis is on the fact that Cogsa talks about loss or damage to a shipment under a bill of lading so that when a suit is started, the limitation never

arises. This obvious reading of Cogsa was denominated frivilous by a Court of Appeals, apparently unwilling to understand.

But there is a question of fact which is also involved which would defeat Cogsa's limitation even if it were not defeated by the timely brought suit. That is where estoppel would arise where the actions of the carriers had fraudulently prevented the previously started suits to be tried on the merits. The courts below did not discuss this form of estoppel. Instead, the district court contended itself with declaring, generally, but no estoppel had arisen. Yet, if plaintiff's claims of facts were to be presented on a trial and they were proven, it would be entitled to a recovery. Consequently, it cannot be said that it appears to a certainty that plaintiff was not entitled to any relief.

6. The fifth cause of action is for fraud perpetrated upon the courts in these proceeding actions (A-12 et seq.). These frauds occurred in obtaining the December 7, 1971 judgment in the German trial court. That court had rendered a judgment against the shipowner for $64,018.05 but limited execution to a levy upon the "SEVERN RIVER" saying that the vessel was then sailing the high seas. Such a limitation was possible under German law. Even, as here, the suit was an in person suit against the owner and the vessel had never been seized and was never in the custody of the court.

Such a judgment may be amended on motion if it would appear that the vessel was not amenable to execution, in which case, the court would permit an execution upon the general assets of the judgment debtor.

Then in the German Appeal Court, defense counsel and the insurers of defendants agreed that counsel should advance the argument that the extension of suit time to May 15, 1971, though signed by an agent at New York who represented both the charterer and shipowner, had no authority to sign for the shipowner. Consequently, under the German Commercial Code, the suit would be subject to dismissal for untimeliness, and the appeal court was induced to dismiss the suit as against the shipowner. That unlawful action was proven by the correspondence of the insurers with their agent in Hamburg and as so proven, that proof could not be disregarded. The actions of defense counsel was also proven to be false by defendants' correspondence that they had investigated the question in 1961, and found that the extension was a valid and binding extension on the owner because the agent had taken the precaution to get the authority of Mr. Burns, the New York agent of the owner's insurer, who was conducting the defense of the claim even since the damage was discovered on shipboard on February 10, 1962. Also in a deposition taken of Mr. Burns, by the defendants, Exhibits B on the trial, Mr. Burns had admitted that the extension was valid and binding on the owner because he had

given the ship's agent at New York that authority.

Then, in a suit commenced in April 1972, at Norfolk, where a sister-ship of the SEVERN RIVER had been arrested in admiralty, on a complaint stating the original cargo damage claim plus allegations of the judgment of December 7, 1971, the shipowner, by counsel employed by the same Mr. Burns, agent for the insurer, moved to quash the service of process. In some way, that motion was transformed, without notice, by simply filing claims to reasons for dismissal as on a summary judgment. Plaintiff objected and wanted an opportunity to obtain the record made at the trial court in Germany. That claim was ignored. The defendant claimed res judicata, bar of Cogsa, another action was pending, and that the judgment of December 7, 1971 was "in rem" judgment. He concluded that the complaint against the owner could not rest an "in rem" judgment. Defense counsel for the insurers offered an affidavit signed by defendant's counsel in Germany which stated that it was the law of Germany that the judgment of December 7. 1971 was the same as an "in rem" judgment in the United States.

The district court adopted all four grounds for dismissal, but its opinion was not published. The Court of Appeals affirmed on two of the grounds only; that of time-bar and that of the judgment being an "in rem" judgment. Almost simultaneously with this decision, the Court of Appeals published its

decision of January 9, 1975. That decision affirmed the June 15, 1971 judgment against the charterers that had been appealed but reduced the recovery to $33,000 finding that amount because only 66 of 93 coils had been damaged. It relied upon Cogsa's limitation of $500 per package, but in America that limitation to $500 per package applies to the whole shipment and not to the number of packages damaged. Also as stated above, it dismissed the suit against the shipowner.

Plaintiff moved the Court of Appeals for re-argument submitting a copy of that January 9, 1975 decision. The Court of Appeals had been advised that, by case law, the time-bar of Cogsa was not effected in that suit because the prior filed suits in New York's Southern and Eastern districts and in Germany, and in New Jersey, had defeated the defendants' rights to claim the bar. As to the dismissal by reason of the German judgment being an "in rem" judgment, the court was asked to hold that was rendered moot by the appeal court. The Court of Appeals agreed with the time-bar argument and withdrew that as ground for dismissal. But as to seeking to send the case back to the district court for trial, it states that plaintiff had declared on the judgment of December 7, 1971, and it could not now change to the original cause. Why? It did not say. Certiorari was denied by this court.

Then in 1976, plaintiff went to the District Court of New Jersey where that suit had been dismissed for lack of prosecution with-

out prejudice. Plaintiff sought to restore that case as against both ocean carriers and to substitute the shipowner for the vessel. The court suggested that plaintiff bring in the owner. The motion papers were sent to a known agent of the owner at Baltimore, Tidewater Commercial Corporation, and requested that they appear. They sent the papers to the same Mr. Burns, their insurer's agent, for handling. Mr. Burns employed Newwark counsel. That counsel appeared for the owner but his opposing papers argued for both carriers. The grounds of opposition were that the case was time-barred and res judicata by reason of the German appeal court judgment. He even denied that the owner had once had knowledge of the pendency of that suit in New Jersey. Plaintiff swore to the fact that Mr. Burns was advised of the start of that suit, when in 1961, anticipating a request for a further extension than May 15, 1961, plaintiff refused the proffered extension, because suits been started in Germany, in the New Jersey and in the Eastern District Court. Also, the court was advised the time-bar claim had already been decided by the Court of Appeals, Fourth Circuit, against defendants. Also, there was no question but that the start of the New Jersey suit was May 12, 1961. As to res judicata that was not a lawful defense because it had been obtained by fraud and it remained unpaid and was not effective as res judicata, see Hilton v. Guyot, 159 U.S. 113.

All these matters are recited in

the complaint. Additionally, plaintiff produced in opposition to the motion to dismiss defendant's correspondence relating to the fraud upon the German appeal court. Also plaintiff produced correcpondence and documents received from defendants' files proving that the claims of defense counsel made in this action that Newcastle had a lien on an offset against the proceeds of the German judgment payable to Zack were untrue. The truth was shown to be an attachment filed on a claim of monies owed to Newcastle under an assignment by Federal Insurance Company which when examined, showed the assignment was not to Newcastle but to the shipowner and charterers. These were Exhibits 13 and 14 at the trial.

The facts of these frauds if proven at the trial would entitle plaintiff to a decision directing that these judgments were null and void and to damages by the effort to correct the fraud, see Universal Oil Producing Co. v. Root Refining Co., 328 U.S. 578.

The trial court dismissed this count without reaching the merits. It said at p. A-43, these frauds were to be prosecuted to the courts where they were perpetrated,not in the district court. This is not the law, see Hilton v. Guyot, supra, which was a case originating in the New York District Court and sought to set aside a judgment made in France, for fraud. This court did set aside that judgment. In Griffiths v. Bank of New York, supra, Judge Clarke held for jurisdiction in a suit where the fraud

had been perpetrated upon the court of New York. Then the court below sought to say that extrinsic fraud would defeat the action, but it did not undertake to say that these frauds were not extrinsic frauds. At p. A-44, the trial court states the theory that plaintiff was obliged to meet the fraudulent action at the time when committed, and when it was not made, plaintiff had waived it. But the cases cited do not so hold and there is no such law. In fact, Marshall v. Holmes, 141 U.S. 589 and Hazel Atlas v. The Hartford Company, 322 U.S. 238 are examples of the law that permitted the action for fraud to be brought any time, it was not subject to any time limitation. It was a wrong, a defilement of the administration of justice, Mr. Justice Black said, in Hazel-Atlas. The Court of Appeals imitated the district court despite the submission of many cases in support of the rule that a claim of "fraud upon a court" is rarely suspectible of dismissal on motion because the element of intent to defraud is a triable issue.

The power to vacate a judgment obtained by fraud is an inherent power of the courts, see Universal Oil Products Co. v. Root Ref. Co., supra. Also the court does not have to wait for a party to bring the fraud to its attention, it may move, sua sponte, see Mr. Justice Black's comments in Hazel-Atlas. A decision produced by a fraud "is not in essence a decision at all", see Kenner v. Comm. of Int. Rev., CA7th, 1968, 387 F.(2) 689, c.d. 393 U.S. 841, 89 S. St. 121,

21 L. ed.(2) 112. The case where the use of prejury was planned, held to be a fraud upon the court, see Hodge v. Huff, 140 F.(2) 686-688; In re Murchison, 249 U.S. 123, 136; Burbrook Mfg. Co. v. St. George Textile Corp., 283 App. Div. 640, (Mr. Justice Breitel); Ross v. Preston, 292 N.Y. 456; Verplanck v. Van Bureg, 76 N.Y. 247; Publicker v. Shallcross, 106 F.(2) 949; Griffith v. Bank of New York, 147 F.(2) 899; Chicago R.S. & R. Rwy. Co. v. Colicotte, 267 F. 799, Marshall v. Holmes, 141 U.S. 589 and Hilton v. Guyot, 159 U.S. 113, the latter talking of a foreign judgment having been obtained by fraud.

Both Moore, Fed. Practice, at Vol. 7, p. 607 and Wright & Miller at Vol. 11, par. 2870, pp. 247-248 say that fraud upon a court renders the decision a nullity. Both authors explained that fraud upon a court is in a different category because it is an act of an officer of the court which induces the court to accept the fraudulent statements of fact to the injury of justice and the litigant; see Moore at p. 513, both cite Sutter v. Easterly, 354 Mo. 282, 162 A.L.R. 437, Great Coastal Express Inc. v. International Brotherhood of Teamsters, 86 F.R.D. 137.

The Fifth Amendment reads in pertinent part:

> "No person had * * * be deprived of life liberty or property without due process of law"

Due process is required of our courts,

Brinkerhoff-Faris v. Hill, 281 U.S. 623, 681. Where a court's errors are so arbitrary or are a capricious exercise of power or is in clear conflict with those principles which have been established in our system of juries-prudence, the supervisory powers of this court are called upon, see Bowie v. Columbia, 378 U.S. 347. Pointer v. Texas, 380 U.S. 400, and Rochin v. California, 342 U.S. 165, 12 A.L.R.(2) 1396. The courts below failed to follow these and the rule of Conley v. Gibson, 355 U.S. 41, stating that a trial is a search for the truth.

7. The majority does not, like the district court, cite any applicable law to support the dismissals. They failed to sift the fact claims to reach the bottom line, what are the true facts. They are that plaintiff is owed money and the law says they are entitled to be paid. Why then do they show so much antipathy towards plaintiff. The majority calls plaintiff's efforts scatter-gun attacks, not a fight for the truth. It does not,however, say that the plaintiff's attack was not sound. Even its opening sentence is a forerunner of its antipathy but it is untrue and has no support in the facts for a useless waste of the court's time. It assumes that plaintiff has "consumed an inordinate amount of the resources of courts in this country and abroad". The short answer to that is why didn't they allow the recovery that plaintiff was entitled to, instead of doing a lot of talking about things not really dispositive by the logic of the facts.

The supervisory powers of this court ought once more be used to reassert justice in the Federal Courts, be rectifying the errors below. They show, in the decisions, in bold relief, a plaintiff, in a two decade search for truth being turned back by words avoiding the facts under the guise of defense that were not applicable to the facts, nor were they authorised in law. In Stoll v. Gottlieb, 305 U.S. 165, 171, Mr. Justice Reed said that such actions were unconstitutional.

It surpasses common sense that a court would find that the defendants owed money but they were excused from paying it. While the constitution makes sense, the decisions below do not. They even misread the words of a plain contract to say 'no'. Then about fraud, the trial court did not say that the facts alleged were not fraudulent but it relied on words of alleged defense which have no authority in law to refuse to try the facts. The majority opinion said the frauds were not extrinsic. The court was apparently not familiar with the defination. Mr. Justice Black in the Hazel-Atlas case was satisfied to say that inducing the court to act on the basis of false facts submitted by a lawyer was fraud upon the court; but if it has to consider whether extrinsic or intrinsic, he said, it was extrinsic because it had been planned. Judge Breitel in Burbrook, supra, defined extrinsic fraud clearly as a plan to use prejury in the courts.

Also, the absolute refusal of the trial court to consider any claim of fraud upon the court, caused him to avoid reference to any description of the falsehoods being uttered by defense counsel and at the trial he ordered counsel to refrain from producing the proof. Also, he curtailed discovery proceedings refusing to hear of complaints of what defense counsel had done to frustrate discovery. This is contrary to Hickman v. Taylor, 329 U.S. 495, Schlaugenhauf v. Holder, 379 U.S. 104, 114, 115; and Harbert v. Lando, 441 U.S. 153.

The minority exposes the defendants as the cause of plaintiff's travail, see the last paragraph of that opinion, p. A-79. That tells of an incident that epitomizes how much was the effort at exposing the frauds to unbelieving jurists, was maligned. Yet, see 11 Wright & Miller, Fed. Prac., Section 2870 and 7 Moore's, Fed. Prac., in his chapter on fraud upon the court because both treat of the Hazel-Atlas case as words cleansing a cancer in the courts. Moore also discusses United States v.Throckmorton, saying that this court should scrintinize it on the strength of Marshall v. Holmes, but,there is distinction between the two that might be stressed. The fraud in Throckmorton was perpetrated by a non-lawyer.

Also, the Second Circuit seems hesitant to treat with frauds on the court. See Serzysko v. Chase Manhattan Bank, 461 F.(2) 669 and Kupferrnan v. Consolidated Research, 459 F.

(2) 1072. Not so the First Circuit where the court comes out, unhesitantly, to say it will use its inherent power, in Greater Boston Tel. Corp. v. F.C.C., 463 F.(2) 768.

A word from this court would perhaps cure the cancer of "Fraud upon the Court" if only to maintain the integrity of the courts. While this would help Zack, the ast bulk of the thousands of litigants seeking justice in our courts would be protected against the problem of creditability that has faced Zack. That brings up one last point. If this court reverses, it would not be fair to send this case back to Judge Sweet. Section 1455a of 28 U.S.C. provides the remedy where a trial judge has acted in such a way as to call his impartiality into doubt.

WHEREFORE, it is respectfully asked that the jury problem might be treated summarily, but if not the petition ought to be granted. The facts of the Fourth Cause of Action demands a review. Also, the dismissal of the other causes are palpable violative of due process and this writ should be granted for a review of that problem.

Anthony B. Cataldo

ANTHONY B. CATALDO
Attorney for Petitioner